C. D. Michel – SBN 144258
cmichel@michellawyers.com
Sean A. Brady – SBN 262007
sbrady@michellawyers.com
Matthew D. Cubeiro – SBN 291519
mcubeiro@michellawyers.com
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN RUPP, et al.,

Plaintiffs,

vs.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No.: 8:17-cv-00746-JLS-JDE

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: July 28, 2023
Hearing Time: 10:30 a.m.
Judge: Josephine L. Staton
Courtroom: 8A

[Filed concurrently with Plaintiff's Disagreements with Defendant's Survey of Relevant Statutes; Declaration of Sean A. Brady; and Response to Defendant's Statement of Uncontroverted Facts and Conclusions of Law]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. INTRODUCTION

> *Bruen*'s embrace of the text-and-history test provides clear guideposts for how the constitutionality of these types of bans must now be assessed. In short, there is zero historical support from the Founding—or even the Reconstruction era—for banning commonly possessed arms; under the *Bruen* test, that is the end of the matter.[1]

That should indeed be the end of the matter. But California refuses to respect the fundamental right to keep and bear arms, and rages against the confines that *Bruen*'s text-and-history test places on government. The State knows there are no "well-established and representative analogues" for banning the rifles owned by millions of Americans for lawful purposes, including self-defense, that California hyperbolically labels "assault weapons." The State, facing a Second Amendment that has at long last been restored and will now be much more difficult to infringe, essentially asks this Court to contort *Bruen* beyond recognition to uphold its ban. This Court should not oblige but should deny the State's motion.

II. ARGUMENT

The Supreme Court's recent *Bruen* decision established a clear framework that courts must follow when analyzing *any* Second Amendment challenge. After expressly disclaiming "intermediate scrutiny" that involves "interest balancing" as not what "the Constitution demands here," *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2118 (2022), the *Bruen* Court articulated the correct test as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.

[1] Mark W. Smith, *NYSRPA v. Bruen*: A Supreme Court Victory for the Right to Keep and Bear Arms—and a Strong Rebuke to "Inferior Courts", 24 Harvard J. L. & Pub. Policy Per Curiam 8 (2022).

Id. at 2129-30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 (1961)).

Because the Banned Rifles are "Arms" within the Amendment's text, the AWCA's ban on them is "presumptively" unconstitutional. To rebut that presumption, the State would need to show that there is a historical tradition of banning such rifles. That it cannot do. *Heller* teaches us that there is no tradition of banning arms unless they are "dangerous and unusual." 554 U.S. at 625-27. Because the Banned Rifles are owned by the millions for lawful purposes, they definitionally do not fall within that category. *Heller*, 554 U.S. at 582, 624-25. No further analysis is thus necessary or required. But even if the State were to perform a historical analysis, even under *Bruen*'s "more nuanced approach," it would quickly become obvious that the State still cannot meet its burden under any standard because there simply is no tradition of banning arms commonly owned for lawful purposes; particularly just for having features that increase their accuracy and control. The Court should thus deny the State's motion.

A. The Second Amendment's Plain Text Covers the Banned Rifles

1. The Banned Rifles are "Arms" under the Second Amendment

Bruen instructs courts to first determine whether the Second Amendment's "plain text covers" the conduct at issue. *Bruen*, 142 S. Ct. at 2126. Here, California bans certain rifles. The only relevant question is thus whether those Banned Rifles constitute "Arms" under the Amendment. They clearly do. Whether something is an "Arm" depends *entirely* on whether it is "a[] thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 625. That the Banned Rifles meet that definition is undeniable.

Nevertheless, with history not on its side and thus hoping to avoid *Bruen*'s historical test, the State makes strained, desperate arguments for why the AWCA's rifle ban does not deserve Second Amendment scrutiny in the first place. Specifically, the State argues that that the Amendment's text does not cover the Banned Rifles because they "are not 'Arms' *in common use for self-defense*." MSJ at 12 (emphasis

added). The qualifier that an item must be "in common use for self-defense" is found nowhere in the Amendment's text nor in any authority. It is thus irrelevant in deciding whether an item is an "Arm."

To be sure, a ban on "Arms" *not* "in common use" *may* be "consistent with the Nation's historical tradition of firearm regulation" and thus survive *Bruen*'s *historical* inquiry. *Bruen*, 142 S. Ct. at 2143. But that is irrelevant in determining whether an item is an "Arm" within the Amendment's *text* that is deserving of that historical inquiry. Indeed, its text reaches *all* arms, dangerous, unusual, or otherwise because we begin from the premise that the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 142 S. Ct. at 2132 (quoting *Heller*, 554 U.S. at 582). In sum, whether an item is an "Arm" is a separate question from whether it has been historically restricted, and the State errs by conflating the inquiries.

The State is also wrong that Plaintiffs shoulder the burden of establishing that the Amendment's text covers the Banned Rifles. Because the Banned Rifles are undeniably bearable arms, the Supreme Court has already established that they prima facie meet the definition of "Arms." *Heller*, 554 U.S. at 582. And any burden of Plaintiffs is thus met.

2. The State's comparison of Banned Rifles to M-16s is irrelevant.

The State also argues that the Second Amendment's text excludes the Banned Rifles because they are supposedly "like the M-16 and are most useful in military service" and thus cannot be "in common use" for lawful purposes. MSJ at 12. Why that would exclude them from the definition of "Arms" the State, again, does not explain. In any event, the Supreme Court did not identify the M16 rifle "and the like" as weapons that "may be banned," as the State claims. *Id*. at 13.

Indeed, that section of *Heller* was engaged not in identifying another limit on the word "arms," but in analyzing the *historical* limitations of the right. And in the

paragraph immediately preceding its reference to "M-16 rifles and the like," the Court had identified the historical dividing line between protected and unprotected arms: arms "in common use" are protected, while "dangerous and unusual weapons" are not. *Id*. at 985. This is a historical test and one that the Banned Rifles easily satisfy, as Plaintiffs discuss below. *Bruen* confirms that the *Heller* Court was not adding a limitation to its textual interpretation of the word "arms" by clarifying that *every* Second Amendment case must proceed first by analyzing the text of the Amendment and then by examining our nation's history of firearm regulation, which, in challenges to a ban on a type of firearm, requires determining whether the specific arm is "dangerous and unusual." *Bruen*, 142 S. Ct. at 2127-28.

Heller's reference to "M-16 rifles and the like" was not intended to exempt from Second Amendment protection any firearm that could be likened to an M-16 rifle in some unspecified way. Rather, as this Court correctly observed in its previous ruling on this matter, *Heller*'s mention of the M-16 was in the context of "justify[ing] the fact that some dangerous and unusual weapons *that are most useful in military service*—such as the M-16—can be banned despite the prefatory clause's ostensible mandate that the right to bear arms be connected to a well-regulated militia . . .." *Rupp*, 401 F. Supp. 3d at 986 (emphasis added). In other words, the *Heller* Court was anticipating the objection that application of its *historical* "common use" test—which could permit the government to ban some firearms like fully automatic machine guns *even though* they are used by the military—is out of step with the Amendment's stated purpose to preserve the militia. 554 U.S. at 267. The M-16 was merely an example of a *military* weapon the banning of which *might* be consistent with the Second Amendment, despite the militia clause, *assuming* it is not in common use.

In any event, while some, but not all, Banned Rifles share various characteristics with the M-16 rifle, including appearance, none is "like" the M-16 in the way relevant to *Heller*'s discussion of it. The context of *Heller*'s "M-16" reference was a discussion of "dangerous and unusual" arms that are "most useful in

military service." 554 U.S. at 627. To be sure, as this Court also correctly observed in its previous ruling, *Heller* did not "create a test whereby *any* weapon that is 'most useful in military service' is outside the scope of the Second Amendment." *Rupp*, 401 F. Supp. at 986 (emphasis added). But it was discussing *only* dangerous and unusual weapons that happen to be used in the military. Reason dictates that to be considered "most useful in military service," a weapon must at least be in use by an actual military. Yet, the State's own expert could not identify a single military anywhere in the world (with the *possible* exception of Israel) that employs the Banned Rifles. SUF Nos. 186-187. That should be the end of this inquiry, even if the "like" M-16 was a test—and it is not. Tellingly, *Heller*'s author, did not share the interpretation of his opinion that Banned Rifles are so "like" the M-16 that they lack Second Amendment protection. *See Friedman v. City of Highland Park*, 577 U.S. 1039, 1039 (2015) (Thomas, J., and Scalia, J., dissenting from the denial of certiorari).

Finally, but perhaps most importantly, even assuming everything the State says about what makes the "AR-15" so "like" the M-16 is true (and it is not), it is all irrelevant because Plaintiffs are not challenging the "AR-15 Control Act." They challenge the "Assault Weapon Control Act." That Act bans *every* semiautomatic rifle, shooting *any* type of centerfire ammunition, merely for having control and accuracy enhancing features. Ironically, under the AWCA it is perfectly legal to possess an AR-15 rifle with attributes that the State complains about, as long as it does not have the Enumerated Features. That is because other than the Enumerated Features, the AWCA does not regulate *any* of the attributes that the State lists as making the AR-15 comparable to an M-16: barrel twist, ammunition type, muzzle velocity, etc. MSJ at 14-15.[2] For that reason, the State's entire discussion of injuries

[2] The main "expert" the State relies on for these claims, Colonel Tucker, is not credible. While no one can deny his service to his country, he is not a ballistics expert, and his outlandish claims in this regard have already been widely discredited, including by people he admits have superior knowledge to him in the field of firearms. *See* Brady Decl., Ex. 54 (Expert Report of J. B. Boone); Brady Decl., Ex. 66 (Kopel article on power of AR rifles); Brady Decl., Ex. 65 ("*Here Are All The Problems With California's Expert Witness Testimony In Gun Ban Case"*).

that "AR-15 rounds" supposedly make are wholly irrelevant, as the State does not even seek to restrict those rounds, just certain features of some (not all) of the rifles that shoot them. *Id*. Other than barrel length, which the AWCA does not regulate, the wound made does not depend on the rifle, but rather the ammunition used. Brady Decl., Ex 1, at 5. And some Banned Rifles do not even have the Enumerated Features. For example, the State fails to explain how the SKS with a detachable magazine is "like" the M-16 when it is made of wood, has no "pistol grip" (as defined in the AWCA), adjustable stock, or flash suppressor.[3] Cal. Penal Code § 30510; Cal. Code Regs. tit. 11, §§ 5495-5499. In sum, the State's comparison of the AR-15 to the M-16 is a strawman focusing on features of the AR-15 that the AWCA does not even regulate and are thus wholly irrelevant to this case.

3. Section 30515(a)'s features-based "assault weapon" definition regulates Arms, not just "accessories."

The State additionally argues that the features-based "assault weapon" definition found in Section 30515(a) does not regulate "arms" but merely arms' "accessories" which have no Second Amendment protection. MSJ at 10. That argument is specious. As its name indicates, the Assault *Weapon* Control Act regulates weapons, not "accessories." Indeed, the AWCA does not prevent the acquisition or possession of pistol grips, flash suppressors, adjustable stocks, or detachable magazines, nor their inclusion on all rifles; e.g., a rimfire or lever-action rifle. Instead, the AWCA expressly bans "semiautomatic, centerfire *rifles*" configured with any of those features. Cal. Penal Code § 30515(a)(1)(A)-(F).

Before adopting the features-based definition that the State claims regulates "accessories" only, the AWCA originally banned dozens of semiautomatic rifles by including their make and model on a list. Cal. Penal Code § 30510; Cal. Code Regs.

---

[3] An image of this SKS can be seen on page 39 of the following PDF, which is the California Attorney General's Assault Weapons Identification Guide (2001): https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/aws-guide.pdf (last visited June 23, 2023).

tit. 11, §§ 5495-5499. The State does not extend its "accessory" argument to that list, likely because those rifles are "assault weapons" regardless of whether their configuration includes the so-called "accessories." *Id.* Critically, the State itself describes the reason that the Legislature subsequently adopted its "alternative" features-based "assault weapon" definition as "address[ing] the proliferation of 'copycat' *weapons* that were 'substantially similar to *weapons* on the prohibited list but differ[ent] in some insignificant way, perhaps only the name of the *weapon*, thereby defeating the intent of the ban.'" MSJ at 5 (emphasis added). In other words, Section 30515(a) was not intended to target any particular features per se, but to close a perceived "loophole" to the AWCA that failed to restrict particular *weapons*.

Footnote 10 of its brief shows the logical folly of the State's argument. It suggests that barrels and stocks are not protected, or at least not ones of a particularly short length. MSJ at 11. But that necessarily means that barrels of a longer length must be protected. So are barrels/stocks of one length protected "arms" and another not? What informs that analysis? The answer is: nothing. That is because the State invented the "necessary"-to-the-functioning-of-the-arm test to qualify for Second Amendment protection. There is simply no authority supporting it.

In any event, we are not talking about trivial parts or accessories here. The features listed in Section 30515(a) are designed to improve a rifle's function (accuracy and control). SUF Nos. 159, 175-177. That is precisely the reason the State seeks to restrict regular citizens from having them. SUF No. 44. It cannot be that the Second Amendment is neutral on firearm progression of this nature. Otherwise, government could leave its citizens only with antiquated, relatively ineffective arms, like muskets. After all, other than a barrel, chamber, firing mechanism, and a trigger, nothing is really "necessary" to make a firearm function. But the Supreme Court has already rejected the notion that modern firearm developments are unprotected in holding that the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the*

founding." *Heller*, 554 U.S. at 582; accord *Caetano*, 577 U.S. at 411; *see also Bruen*, 142 S. Ct. at 2132, (emphasis added). This Court should thus reject the State's suggestion that Section 30515(a) of the AWCA does not restrict arms.

B. *Heller* and *Bruen* Confirm that History Does Not Condone Banning Arms Like the Banned Rifles that Are in Common Use

Because the Banned Rifles are "arms" under the Second Amendment's plain text, the AWCA's banning them is "presumptively" unconstitutional and the State thus bears the burden of proving its ban on their acquisition and possession is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. In other contexts, applying this test could require research into this Nation's history of firearm regulation. That exercise is unnecessary here, however, because between *Bruen* and *Heller*, the Supreme Court has already established the contours of the relevant historical tradition: bearable arms cannot be banned unless doing so would fit into the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 2128 (quoting *Heller*, 554 U.S. at 627). And a law, by definition, will not fit into that tradition if it bans "the possession and use of weapons that are 'in common use at the time.'" *Id.* at 2128 (quoting *Heller*, 554 U.S. at 627).

The State claims that the "common use" inquiry is a textual one, not a historical one. MSJ at 12, n. 11. But that is not so. In *Heller*, the Court's discussion of "dangerous and unusual" firearms (i.e., those arms that are *not* in "common use") was part of its analysis of the history of recognized limitations on Second Amendment rights, and the Supreme Court specifically noted that it was an exception to the Second Amendment's broad scope that was "fairly supported by . . . *historical* tradition." 554 U.S. at 627, (emphasis added). *Bruen* quoted this same language from *Heller* to explain that the *Heller* Court was "rel[ying] on the *historical* understanding of the Amendment to demark the limits on the exercise of that right." 142 S. Ct. at 2128, (emphasis added); *see also* TRO at 10, *Rocky Mt. Gun Owners v. Town of*

Superior, Colo., 22-cv-01685 (July 22, 2022), ECF No. 18.

In sum, *Bruen* and *Heller* confirmed that whether an arm is "dangerous and unusual" is a *historical* question, not a textual one. The State thus bears the burden of fitting the AWCA's rifle restrictions into a historical paradigm. *See Bruen*, 142 S. Ct. at 2126. Because the Supreme Court has already decided that there is no tradition of prohibiting arms in "common use," this case reduces to the following, straightforward inquiry: can the State prove that the Banned Rifles are not "in common use today"? *Bruen*, 142 S.Ct. at 2132, 2143. Because the State cannot, the AWCA's ban on those rifles is unconstitutional and its motion must fail.

C. The State Cannot Meet Its Burden to Show that the Banned Rifles Are "Dangerous and Unusual" Weapons Unprotected by the Second Amendment Because They Are Undeniably in "Common Use" for Lawful Purposes

The Supreme Court has made clear that "the Second Amendment protects the possession and use of weapons that are 'in common use.'" *Bruen*, 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 627); see *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam) (invalidating stun gun ban); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating Second Amendment). This means that arms that are "typically possessed by law-abiding citizens for lawful purposes" are protected. *Heller*, 554 U.S. at 582, 624-25. Though not their burden, Plaintiffs provide substantial evidence showing that the Banned Rifles are among the most popular firearms with Americans, owned by the many millions, with some estimates as high as 24 million. SUF Nos. 144-151; Brady Decl., Ex. 2 at 2-6; William English, Ph.D., *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 2, 33 (May 13, 2022), https://bit.ly/3yPfoHw (last visited May 22, 2023); *National Shooting Sports Foundation, Inc., Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation* (July 20, 2022) ("NSSF"), https://bit.ly/3QBXiyv (last visited May 22, 2023)); Emily Guskin, et al., Wash. Post, *Why Do Americans Own AR-15s?* (May 22, 2023) (available at bit.ly/3G0vbG9).

That indisputable fact comfortably qualifies Banned Rifles as being in "common use." To put it in perspective, stun guns "are widely owned and accepted as a legitimate means of self-defense across the country," based on evidence that just "hundreds of thousands of Tasers and stun guns have been sold to private citizens." *Caetano*, 577 U.S. at 420 (2016) (Alito, J., concurring). Because "stun guns are 'arms' within the protection of the Second Amendment," a Massachusetts law barring "civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and is therefore unconstitutional." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018).[4] *See also Maloney v. Singas*, 351 F. Supp. 3d 222, 237 (E.D.N.Y. 2018) (the "at least 64,890 metal and wood nunchaku" are in common use). If the 200,000 stun guns *in the country* are in "common use" and thus protected, certainly the millions of Banned Rifles in circulation are too. It is no wonder then that numerous courts have found that the Banned Rifles are in "common use." *See*, e.g., *Heller v. District of Columbia,* 670 F.3d 1244, 1261 (D.C. Cir. 2011); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); TRO at 9-10, *Rocky Mt. Gun Owners*, No. 22-cv-01685; *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1020 (S.D. Cal. 2021), *vacated and remanded*, 2022 WL 3095986 (9th Cir. Aug. 1, 2022); *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016) rev'd, 849 F.3d 114 (4th Cir. 2017) (en banc); *U.S v. Benitez*, No. 17-cr-00348, 2018 U.S. Dist. LEXIS 211398, at *6 (D. Idaho Dec. 14, 2018); *Del. State Sportsmen's Ass'.n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at *14 (D. Del. Mar. 27, 2023).

The State makes a meager attempt to dispute that the Banned Rifles are commonly owned. It all but concedes that they are owned in large numbers but argues that is not relevant because the amount owned supposedly does not translate

[4] "Any attempt by the state to rebut the prima facie presumption of Second Amendment protection afforded stun guns and tasers on the grounds that the weapons are uncommon or not typically possessed by law-abiding citizens for lawful purposes would be futile." *People v. Webb*, 131 N.E.3d 93, 96 (Ill. 2019).

into common ownership. MSJ at 18. The State is wrong. The number of a particular arm in circulation among civilians is the "relevant statistic" for determining "common use." *Caetano,* 577 U.S. at 420 (Alito, J., concurring); *see also Ass'n of N.J. Rifle & Pistol Clubs*, *Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated by Bruen* (finding an "arm" is commonly owned because "[t]he record shows that millions . . . are owned").

The State contends that cannot be the case because "[i]t would not make sense if M16s could someday be protected if longstanding restrictions on their possession and sale were lifted and more M16s were sold to civilians." MSJ at 19. But *Bruen* tells us that it makes perfect sense. Contemplating an almost identical scenario to the one posed by the State, it explained that:

> Regardless, even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of 'dangerous and unusual weapons'—a fact we already acknowledged in *Heller*. See 554 U.S. at 627, 128 S.Ct. 2783. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.' *Ibid.* (internal quotation marks omitted). Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.' *Id.*, at 629, 128 S.Ct. 2783. Thus, even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

Bruen, 142 S. Ct. at 2143. If the American public chooses an arm for legitimate purposes, that arm is protected. Government does not have veto power.

Unable to rebut the overwhelming evidence that the Banned Rifles are common, the State retreats to yet another specious argument. The State claims that to be protected, arms must not only be commonly possessed, but also be "commonly used [and] suitable for lawful self-defense . . .." MSJ at 17. But "Second Amendment

rights do not depend on how often the [particular arms] are *used*. Indeed, the standard is whether the prohibited [arms] are 'typically *possessed* by law-abiding citizens *for lawful purposes*,' not whether the[y] . . . are often *used* for self-defense." *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d. 1267, 1276 (N.D. Cal. 2014), aff'd, 779 F.3d 991 (9th Cir. 2015) (quoting *Heller*, 554 U.S. at 625), (emphasis added). It is enough that they are commonly *possessed* for self-defense and other lawful purposes. They need not meet some arbitrary threshold of use or usefulness that the State has not identified. Otherwise, the State could ban virtually any firearm, as self-defense *use* is fortunately relatively rare and the State could just declare any arm unsuitable for self-defense on a whim, as it does here.

As for the State's belief that the Banned Rifles are unsuitable for self-defense, MSJ at 2, it is not only unsupported by evidence but is irrelevant. Whatever politicians might think citizens "need" for effective self-defense is beside the point. That the American people *possess* Banned Rifles for self-defense and other lawful purposes in significant numbers cannot be seriously disputed. SUF Nos. 144-151. That choice is entitled to "unqualified deference." *Bruen*, 142 S. Ct. at 2131; *see also Heller*, 554 U.S. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").[5]

In short, it cannot be seriously disputed that the Banned Rifles are typically possessed for lawful purposes and are in no way "dangerous and unusual" weapons. They are among the most popular firearms in the country and are used for various lawful purposes. Under *Heller* and *Bruen*, no further historical inquiry is necessary; the AWCA's ban on commonly owned rifles is unconstitutional. Indeed, *Heller* teaches us that there is no relevant historical tradition of banning arms unless they are "dangerous and unusual." 554 U.S. at 625-27.

[5] Even if it were relevant, Plaintiffs have provided the unrebutted testimony of a former FBI firearms instructor who says the Banned Rifles are exceptionally useful for self-defense. Brady Decl., Ex. 54, at 17.

D. No Historical Firearms Regulation Justifies the AWCA's Rifle Ban

At the very least, the State must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126, 2130. The State comes nowhere near meeting this burden—*because it cannot*.

To meets is burden, government must generally produce evidence of historical laws that are "distinctly similar" to the modern law being challenged. *Id*. at 2131. When a modern law addresses "unprecedented societal concerns or dramatic technological changes," however, *Bruen* allows "a more nuanced approach" to the historical inquiry. *Id*. at 2132. Effectively conceding that it cannot meet its burden under *Bruen*'s strict-historical test, the State pleads that it should be permitted to justify the AWCA's rifle ban under *Bruen*'s "more nuanced approach," which allows "reasoning by analogy" to show that the modern law is "relevantly similar" to a "well-established and representative historical analogue." *Bruen*, 142 S. Ct at 2131. The AWCA's rifle ban does not qualify for this more lenient approach. But, even if it did, the State still fails to meet is burden here.

1. A "more nuanced approach" is inappropriate here

First, the AWCA does not address any "*unprecedented* societal concern." The State asserts that mass shootings with modern weapons by a single individual are a new concern. MSJ at 22. Of course, every societal problem can *seem* unprecedented if one whittles it down to such specific criteria. Even assuming it is fair to so strictly define the relevant concern, unfortunately, there is nothing new about such atrocities. Indeed, the State's own expert witness tells of an 1869 mass shooting in Florida. Vorenberg Supp. Rpt. ¶ 96. A single shooter "fired 'thirteen or fourteen shots in rapid succession,' killing and wounding many of the party." *Id.* It was reported that the assailant had likely used a Henry rifle" because of the speed and volume of the shots fired." *Id*. Even assuming mass shootings by an individual are now more prevalent and have higher casualties, the concern is thus not "*unprecedented*" as it must be.

What's more, the same argument could be made about handguns.[6] In fact, "according to a recent study, handguns were the most used type of firearm in mass shootings (32.99% of mass shootings); rifles were used in only 8.25% of mass shootings." *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1048 (S.D. Cal. 2021). Yet as *Heller* makes clear, handguns prevalent use to commit mass murder is not grounds to ban law-abiding citizens from possessing them for lawful purposes, including self-defense. *See* 554 U.S. at 624-645. The same is true for the commonly owned Banned Rifles. Also, this is simply the same argument the State made before *Bruen* just dressed up as a novel issue.[7] The Court should ignore.

Second, there is nothing *dramatically* novel about the technology of these condemned rifles. The Founding Fathers were aware of—and coveted—multi-shot rifles with detachable magazines. *Id.*, Ex. 3 at 3-4. And they were aware of the technological advances being made with firearms. David Kopel, Reason Magazine, *The Founders were well aware of continuing advances in arms technology*, available at https://rb.gy/k23pf (last accessed May 26, 2023). Repeating rifles able to fire over a dozen rounds rapidly have been commercially available since around the Civil War days. Brady Decl., Ex. 57, at 18-22 (Hlebinsky report).[8] And semiautomatic, centerfire rifles with detachable (not "fixed") magazines have been widely available to the public for over a century. SUF No. 149; Chuck Willis & Robert A. Sadowski,

---

[6] For example, the tragic Virginia Tech shooting remains our third-worst mass shooting, with 32 murdered victims and another 17 who were injured. The perpetrator used only handguns. https://www.axios.com/2017/12/15/deadliest-mass-shootings-modern-us-history (last visited June 23, 2023).

[7] In its effort to smuggle back in forbidden interest-balancing arguments, the State makes a series of incorrect assertions regarding the commonality of mass shootings. Page limitations rule out a full response. Suffice it to say that being killed in a mass shooting is "less than...the risk of being killed by a bolt of lightning". Brady Decl. iso Plaintiffs' MSJ, Ex. 55, pp. 20-21. Further, both the State's supporting expert reports on this subject are suspect. Lucy Allen's report is "both subjective and unsupported by any evidence pertaining to legislative intent behind enactment of California's ban on LCMs and assault weapons." *Id*. at 3. Likewise, Louis Klarevas "makes extraordinary claims about the magnitude of the effect of mass shootings on the safety of Americans." *Id*. at 20.

[8] *See also*, Henry, *Henry History*, https://www.henryusa.com/about-us/henry-history/ (last visited May 26, 2023).

The Illustrated History of Guns 256 (2017); *see also Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting); Stephen P. Halbrook, *America's Rifle, The Case for the AR-15* at 145-148 (2022).[9]

Yet, these rifles were almost never targeted for regulation. To the contrary, the federal government, through the Director of Civilian Marksmanship—which was later replaced by the quasi-privatized Civilian Marksmanship Program in 1996 and is still in operation today—has sold these rifles directly to the public by the hundreds of thousands. SUF No. 184; *see also* Halbrook, *supra*, at 198. The only difference between those and the Banned Rifles is the former mostly lacked the Banned Features—although, some had folding stocks and would be banned under the AWCA. Brady Decl., Ex. 3 at 5; Ex. 43.

Features like pistol grips and adjustable stocks have also been around for centuries. Brady Decl., Ex. 3, at 3-11 (Helsley report); Ex. 57, at 27-29 (Hlebinsky report). The AR-15 platform rifle, which possesses the Enumerated Features, has been available to the American public for over 60 years. SUF No. 150; *see also* Jeff Zimba, *The Evolution of the Black Rifle: 20 Years of Upgrades, Options, and Accessories* 10 (2014). It was reviewed in a 1959 issue of *The American Rifleman*, one of the most widely circulated firearm magazines. *Id.*, Ex. 3 at 6, Ex. 2 at 3. The Banned Rifles thus simply cannot be described as "*dramatic* technological changes" but merely the progression of very old technology. What's more, the notion that firearm technology that has been around and widely available for so long without regulation all of a sudden raises some "*unprecedented* societal concern" is untenable.

In sum, because the Banned Rifles simply do not constitute "dramatic technological changes" nor raise any "*unprecedented* societal concern," the AWCA is not entitled to *Bruen*'s more lenient analogical approach.

[9] *See also* Remington, *Model 8 Autoloading Centerfire Rifle*, *available at* https://web.archive.org/web/20130520070354/http://remington.com/products/archived/centerfire/autoloading/model-8.aspx (last visited May 26, 2023).

E. Relevant History Does Not Support the AWCA's Ban on Commonly Owned Rifles

The State has not shown that it should be allowed to proceed to some "more nuanced approach" to analogical inquiry under *Bruen*. But even if it had, that is not a "get out of the *Bruen* free" card. The State must still present an enduring American tradition of genuine analogues that are "relevantly similar" to the modern restrictions it seeks to defend. 142 S. Ct. at 2122. The *Bruen* Court pointed toward at least two metrics: how and why the regulations" govern facially protected conduct. *Id.* at 2133. All the State's proposed analogues ignore one or both of these metrics.

When looking at the "how," this Court should ask whether the challenged modern law and the proposed historical analogue impose a similar *type* of restriction, not just a similarly *severe* one.[10] When looking at the "why," this Court should consider whether the law is "comparably justified," mindful that historical laws enacted for one purpose cannot be used as a pretext to justify a modern law that was enacted for different reasons. *Id*. In short, "a historical statute cannot earn the title 'analogue' if it is clearly more distinguishable than it is similar to the thing to which it is compared." *Antonyuk v. Hochul*, No. 22-0986, 2022 U.S. Dist. LEXIS 182965, at *20 (N.D.N.Y. Oct. 6, 2022). As discussed below, this is the sort of strained comparison-making on which all of the State's proposed historical analogues rely. In banning the sale and possession of common arms, the AWCA is without a single valid analogue. It violates the Second Amendment.

[10] The Court highlighted the importance of clarity when engaged in "analogical reasoning" when it observed that "'[e]verything is similar in infinite ways to everything else,' [Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 711, 774 (1993)], one needs 'some metric enabling the analogizer to assess which similarities are important and which are not,' F. Schauer & B. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249, 254 (2017). For instance, a green truck and a green hat are relevantly similar if one's metric is "things that are green." [*Id.*] They are not relevantly similar if the applicable metric is 'things you can wear.'"

1. Nineteenth Century Laws Regulating "Dangerous and Unusual Weapons" Are Not "Relevantly Similar" to the State's Modern Ban on Firearms in Common Use for Lawful Purposes

The State does not cite a *single law* from the Founding Era to the 19th century that banned *possession* of commonly owned firearms as the AWCA does. Nor could it—no such laws existed, despite the technological leap that occurred during this period.[11] Even still, the State trots out several marginally relevant laws that it claims provide sufficient historical support to save its modern ban on common semiautomatic rifles. They do not.

While page limitations prevent a comprehensive response to every law the State cites in its appendix (a responsive appendix with Plaintiffs' objections has been submitted), several demonstrative examples reveal what is wrong with all the State's proposed analogues. First, the 1686 New Jersey law[12] (as well as similar laws enacted between 1750 and 1799) regulated *carrying* "dangerous and unusual" weapons in public, but not *all* possession like the AWCA does. "The differences between how and why these laws burden a law-abiding citizen's right to armed self-defense is evident." *Boland v. Bonta,* No. SACV2201421CJCADSX, 2023 WL 2588565, at *7

---

[11] Using a lever action, arms like the Henry repeater allowed users to fire as fast as they could operate the lever and pull the trigger—a rate of 28 rounds per minute for the Henry, even when accounting for reloading time. Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 403 (2d ed. 2018). This was obviously a dramatic technological leap over the single-shot firearms that came before. By the end of the Civil War, "repeating, cartridge-fed firearms" were ubiquitous yet never regulated or banned. *Duncan v. Becerra,* 970 F.3d 1133, 1148 (9th Cir. 2020). These "[r]epeating rifles could fire 18 rounds in half as many seconds." *Id.* Contrary to the State's gaslighting claims that these sorts of rifles were not popular, the Library of Congress refers to Winchester's Model 1873 as the "gun that won the west." Library of Congress, *American Firearms and Their Makers: A Research Guide*, https://tinyurl.com/27dpmbbb (last visited June 21, 2023). California apparently thought Winchester so significant, that its Office of Historic Preservation has labeled the Winchester House a historic site in Santa Clara. Office of Historic Preservation – Santa Clara, https://ohp.parks.ca.gov/?page_id=21522 (last visited June 21, 2023).

[7] First, this law is too old to be an appropriate analogue. *Bruen* cautions that not all history is equal in evaluating traditions: "The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." 142 S. Ct at 2136.

(C.D. Cal. Mar. 20, 2023). A restriction on a particular use of an item is categorically different than a complete ban of that item.

Some laws the State presents are very obviously not even close to relevantly similar. For example, the State introduces several regulations on gunpowder storage. Survey Nos.341-350. But those laws were enacted, as one of the State's experts admits,[13] Cornell Suppl. Rpt. ¶ 36, to prevent unintended discharge, and catastrophic explosions and fires in town limits or near a powder house.[14] Such laws were necessary because of the highly combustible and unstable nature of loose gunpowder, which is not a modern concern. They were not enacted to combat crime, in general, or mass killings, more specifically. And, more importantly, they regulated only the *manner* of storing gunpowder; they did not prohibit the possession or use of any common arm. As *Heller* explained in the context of D.C.'s handgun ban, "[n]othing about th[e]se fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on" protected arms. *Id.* The Supreme Court has thus already deemed powder-storage laws to be dissimilar laws focused on fire prevention. *See also Boland,* 2023 WL 2588565, at *8 (explaining that gunpowder storage laws are inapposite because "[t]he main goal of gunpowder storage laws was to prevent fire"); *Renna v. Bonta*, No. 20-CV-2190-DMS-DEB, 2023 WL 2846937, at *13 (S.D. Cal. Apr. 3, 2023) ("Those laws regulated the storage of gunpowder and loaded firearms with gun powder for fire-safety reasons,

---

[13] Dr. Cornell was even more explicit in other recent litigation regarding another California gun law. As Judge Carney in the Central District explained by citing to Dr. Cornell's declaration: "But the goals of gunpowder storage laws and the means used to achieve those goals are very different from those of the UHA's CLI and MDM requirements. The main goal of the gunpowder storage laws was to prevent fire." *Boland v. Bonta*, No. SACV220142ICJCADSX, 2023 WL 2588565, at *8 (C.D. Cal. Mar. 20, 2023) (citing Cornell Decl. ¶ 43 ["Every aspect of the manufacture, sale, and storage of gun powder was regulated due to the substance's dangerous potential to detonate if exposed to fire or heat."].)

[14] *See, e.g.*, Thomas Wetmore, Commissioner, The Charter and Ordinances of the City of Boston: Together with the Acts of the Legislature Relating to the City at 142-143 (1834), *available at The Making of Modern Law: Primary Sources* (An Act ... Prudent Storage of Gun Powder within the Town of Boston. Whereas the depositing of loaded arms in the houses of the town of Boston, . . . is dangerous . . . when a fire happens to break out in said town").

not gun-operation safety reasons.").

Trap gun restrictions are similarly irrelevant. "Trap guns" were indiscriminate devices rigged to fire without the presence of a person. Spitzer Suppl. Rpt. ¶¶ 63-66. They could be triggered by any unsuspecting animal or person that happened to walk by. The State claims that the existence of laws restricting the use of "trap guns" in early America provides relevant historical support for its gun ban. MSJ at 24-25. But like early gunpowder restrictions, these laws, by and large, did not ban any class of arms. Rather, they regulated the *manner* of using them. That is, they banned setting a loaded, unattended gun to prevent unintended discharges. To be sure, just about any gun restriction can be described as necessary to promote public safety or protect life. But "trap gun" restrictions were necessary because setting loaded, unattended guns to discharge automatically imposes an incredibly specific threat to life that is entirely unrelated to violent crime.

Next, the State focuses on the restrictions on Bowie knives and similar blades that proliferated in the 1800s. MSJ at 23. These laws, by and large, regulated only the manner of carrying such arms, while four laws taxed their sale, three taxed their ownership, ten restricted sale *only* to certain groups, and four punished only brandishing. Though the State tries to avoid drawing attention to the omission, it is glaringly obvious that "[a]t the end of the 19th century, no state prohibited possession of Bowie knives." David Kopel, *Bowie Knife Statutes 1837-1899*, Volokh Conspiracy (Nov. 20, 2022), https://bit.ly/3yZYzZx. *See also Harrel* Pls.' Reply 8-9. What's more, historical restrictions on Bowie knives and similar blades were far fewer than the number of handgun-carry bans that the *Bruen* Court found insufficient to justify New York's modern carry ban. *Id.*

The State's proposed analogues concerning concealable pistols fare just as poorly. Again, the historical prohibitions the State relies on apply to *concealed carry* of pistols, not mere possession. A handful of restrictions on the manner of carrying arms in public is no way similar to a total ban on their acquisition and possession. So

they are not "relevantly similar" under *Bruen*. 142 S. Ct. at 2122.

In attempting to make its case for the laws it cites as being "relevantly similar" analogues that justify its modern ban, the State claims that "like the AWCA, they did not restrict weapons that are well suited to self-defense and left available alternative weapons to be used for lawful self-defense"[15] and that "[t]he slight burden of the AWCA stands in stark contrast with the law at issue in *Bruen*, which made it "virtually impossible" for most 'law-abiding people to carry a gun outside the home for self-defense.'"MSJ at 28-29 (quoting *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring)). This argument fails for three reasons.

First, when the State claims that the "burden" on the right is minimal because the restricted arms are not necessary for self-defense and can be justified by some governmental interest, it is simply engaged in interest-balancing *disguised* as a history-based argument, which *Bruen* expressly forbids. *See* 142 S. Ct. at 2133 n.7. And it dismisses *Heller*'s instruction that "[t]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms." *Caetano*, 577 U.S. at 421 (Alito, J., concurring) (paraphrasing *Heller*, 554 U.S. at 629).

Second, the State's claim that the AWCA is "relevantly similar" to the "dangerous and unusual weapons" regulations of the 17th, 18th, and 19th centuries is deeply rooted in the same flawed analysis of the district court in *Bevis v. Naperville*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023) (denial of preliminary injunction), which the State has cited throughout its brief. There, the court held that "assault weapons . . . fall under" the category of "dangerous *or* unusual" weapons that were, historically, subject to some level of regulation. *Bevis,* 2023 WL 2077392, at *10-14 (emphasis

[15] The Second Amendment does not only apply to self-defense, but all lawful purposes. While self-defense is central to the Second Amendment, "the [Supreme Court] also said the Second Amendment protects the right to keep and bear arms for other 'lawful purposes,' such as hunting." *Heller v. District of Columbia*, 399 U.S. App. D.C. 314, 330 (2011) (citing *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008)). Target shooting, hunting, and competition shooting are all lawful uses of the banned arms. If it were otherwise, the State could constitutionally ban even bolt-action hunting rifles, as those are not frequently used for self-defense.

added). But the *Bevis* preliminary injunction order rests on highly dubious legal and factual findings.[16] Perhaps most importantly, the opinion "begins with the *fundamentally wrong* criterion that being particularly 'dangerous,' alone, justifies banning a type of firearm." Halbrook, *Judicial Salvo*, *supra* note 11 (emphasis added). In fact, it practically rewrites the *Heller* test for what arms come within the Constitution's grasp. While it *may* be true that there is some "historical tradition" of excluding "'dangerous *and* unusual' weapons," from the Amendment's protection, *Duncan v. Bonta*, 19 F.4th 1087, 1148 (9th Cir. 2021) (quoting *Heller*, 554 U.S. at 627), the Supreme Court does not speak in terms of "dangerous [*or*] unusual" weapons—no matter how many times the *Bevis* court suggested it does.

And third, the State's pre-20th century laws are not "similar" to the Act because not one of them banned the mere possession of arms in common use by law-abiding citizens (like the AWCA does). Instead, they focused on regulating just the *carry* of certain arms, a fact the State readily concedes. MSJ at 30. The State dismisses these differences by arguing that "the Supreme Court has already settled this question, explaining that the 'historical tradition of prohibiting the carrying of dangerous and unusual weapons'—a tradition reflected by many of the surveyed dangerous weapons laws…'fairly support[s]' limitations 'on the right to keep and [not just] carry' weapons". MSJ at 30. But the State crucially omits that the Supreme Court prefaced that remark by explaining that the sort of weapons "in common use at the time" were not subject to this historical tradition. *Heller*, 554 U.S. at 627. Only "dangerous and unusual" weapons can thus be restricted through this analogy, not firearms commonly owned for a variety of lawful purposes.

---

[16] *See* Stephen Halbrook, *Second Amendment Roundup: An Opening Judicial Salvo in Defense of Illinois' New Rifle Ban*, Volokh Conspiracy (Mar. 13, 2023), https://reason.com/volokh/2023/03/13/second-amendment-roundup-an-opening-judicial-salvo-in-defense-of-illinois-new-rifle-ban/ (discussing the legal errors of the *Bevis* order); David Kopel, *How Powerful Are AR Rifles? About the Same as Other Rifles*, Volokh Conspiracy (Feb. 27, 2023, 2:37 PM), https://reason.com/volokh/2023/02/27/how-powerful-are-ar-rifles/ (explaining in detail the *Bevis* decision's countless erroneous claims about the purportedly "exceptional danger" that "assault weapons" pose).

Again, "a historical statute cannot earn the title 'analogue' if it is clearly more distinguishable than it is similar to the thing to which it is compared." *Antonyuk*, No. 22-cv-0986, 2022 U.S. Dist. LEXIS 182965, at *20. Historical laws that banned just the carry of certain arms[17] are clearly more distinguishable than they are similar to the State's flat ban on the sale and possession of some of the most popular arms in the country. The State invokes *Bruen*'s admonition that its holding does not impose a "regulatory straightjacket." *Bruen*, 142 S. Ct. 2111 at 2133. But with its shoddy proposed analogues that bear no meaningful similarity in neither "how" nor "why" the regulations operated, the State demands a "regulatory blank check." *Id*. This Court should not sign it.

2. The State's Reliance on 20th Century Machine Gun Laws Is Unpersuasive and Factually Wrong

Bruen gave little weight to laws that long pre-dated the founding, finding them only relevant where evidence shows that they survived to become the laws of the Founders. 142 S. Ct at 2136 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933)). The Court considered 20th-century history even *less* important, relegating its discussion of the laws of the period to a mere footnote. *Id.* at 2154, n.28. Declining even to consider such evidence, the Court explained that, like laws of the late-19th-century, 20th-century evidence "does not provide insight into the meaning of the Second Amendment *when it contradicts earlier evidence*." *Id.* (emphasis added). This does not mean the State can rely on any law from the mid-to-late-19th or 20th centuries as long as it does not *conflict* with an 18th-century law. Rather, the State may only rely on laws enacted after 1868 when they *confirm* our understanding of the text and 1791 tradition. The *Bruen* analysis supports this reading. To be sure, *Bruen* left open the possibility of using 1800s sources. But when the *Bruen* Court discussed those laws, it was "as mere confirmation of what the Court thought already had been

[17] None of which applied to rifles. Indeed, the State cited *no laws* that restricted the sale or possession of popular repeating rifles in the 19th century.

established." 142 S. Ct. at 2137; *see also* 142 S. Ct. at 2163 (Barrett, J., concurring) ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.").[18] And, based on *Bruen*'s guidance, early post-*Bruen* decisions rebuked calls to rely on evidence of 20th-century laws. *See, e.g.*, *United States v. Nutter*, No. 21-00142, 2022 U.S. Dist. LEXIS 155038, at *9 (S.D. W.Va. Aug. 29, 2022) (laws originating in the 20th century cannot justify a law *unless similar laws existed at the founding*); *Firearms Pol'y Coal., Inc. v. McCraw*, No. 21-1245, 2022 U.S. Dist. LEXIS 152834, at *29 (N.D. Tex. Aug. 25, 2022) (22 state laws adopted in the 20th century was insufficient historical justification for a ban on firearms purchases for those under the age of 21).

Still, the State submits a collection of "anti-machine-gun laws" adopted in 32 states between 1925 and 1934 and the 1934 National Firearms Act "severely restricting" machine guns as justifying the AWCA's banning of *semiautomatic* rifles. MSJ at 27. But the prevalence of machine gun restrictions contrasted with the dearth of *semiautomatic* restrictions at that time, when semiautomatics had been available for decades before, does the exact opposite. It confirms the tradition of treating the two differently, restricting machine guns but not semiautomatics. The State claims that "at least 11 states, including the District of Columbia" also had restrictions on semiautomatics. *Id*. But most of those laws appear to have been targeting machine guns whose clumsy definitions unintentionally included some semiautomatics. Of note, all but one was repealed within decades. *Heller II*, 670 F.3d 1244 at 1250.[19]

---

[18] There is other recent precedent supporting Plaintiffs' interpretation of the Court's use of 19th and 20th century evidence. *See, e.g.*, *Espinoza v. Montana*, U.S. __, 140 S. Ct. 2246 (2020) (reviewing 30 state statutes from the second half of the 19th century, the Court held that "[s]uch a development, of course, cannot by itself establish an early American tradition ... such evidence may reinforce an early practice *but cannot create one*.") (emphasis added).

[19] *See* 1927 Mich. Pub. Acts 887, § 3 (prohibiting firearms able to be "fired sixteen times without reloading"), repealed via 1959 Mich. Pub. Acts 249, 250; 1927 R.I. Pub. Laws 256 §§ 1, 3 (prohibiting firearms "which shoot[] more than twelve shots semi-automatically"), repealed via 1959 R.I. Acts & Resolves 260, 260, 263 (amended 1975); 1933 Ohio Laws 189, §§ 12819-3, -4 (prohibiting "any

That is hardly a long-standing tradition of prohibitions on the type of popular rifles that California bans.

If any of the State's cited 20th-century laws actually restricted possession of *semiautomatic* firearms (as opposed to mistakenly equating automatic and semiautomatic firearms),[20] these outlier laws would contradict this country's long history of *not* banning classes of arms in common use for lawful purposes. The 20th-century semiautomatic restrictions the State cites thus contradict the relevant historical tradition rather than reaffirm it. Under *Bruen*, that makes them entirely irrelevant to the analysis.

III. CONCLUSION

For the foregoing reasons, this Court should deny the State's motion for summary judgment as a matter of law.

Dated: June 23, 2023

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady, Attorneys for Plaintiffs

firearm which shoots more than eighteen shots semi-automatically"), repealed via 1972 Ohio Laws 1866, 1963 (setting 32-round limit); see also 2013-2014 Leg., H.R. 234 (Ohio) (fully repealing magazine ban); 47 Stat. 650, §§ 1, 14 (1932) (D.C. law prohibiting "any firearm which shoots … semiautomatically more than twelve shots without reloading"), repealed via 48 Stat. 1236 (1934), currently codified as amended at 26 U.S.C. §§ 5801-72.

[20] *Compare* MSJ at 27:26-28 (claiming that "At least 11 states, including the District of Columbia, also enacted restrictions on the manufacture, sale, and possession of *semiautomatic* firearms capable of firing a certain minimum number of rounds without reloading"), with the appeals panel ruling in *Duncan*, 970 F.3d at 1150 & n.10 (holding that only three states and D.C. restricted even just the firing *capacity* of semiautomatics).

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Name: *Rupp, et al. v. Bonta*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Anna Ferrari
Deputy Attorney General
Email: anna.ferrari@doj.ca.gov
Christina R.B. Lopez
Email: christina.lopez@doj.ca.gov
John D. Echeverria
Email: john.echeverria@doj.ca.gov
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 23, 2023.

Christina Castron